RENDERED: October 5, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002106-MR

LEANNA G. McNAY — APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 97-CI-00319

JAMIE P. HADLEY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Leanna G. McNay has appealed from a judgment of the Russell Circuit Court entered on July 9, 1999, following a jury verdict in an automobile accident case. Having concluded that any error in the jury instructions was harmless and that the jury's verdict was support by substantial evidence, we affirm.

On October 30, 1996, McNay was attempting to turn right into a convenience store parking lot, when her vehicle was struck from behind by a vehicle being drive by the appellee, Jamie P. Hadley. On October 17, 1997, McNay filed her complaint in

Russell Circuit Court, alleging that as a result of Hadley's negligent operation of his vehicle, she had sustained "severe and permanent injury to her body." McNay sought damages for past and future pain and suffering, past and future medical expenses, diminished earning capacity, and for the cost of repairing her automobile.

At trial, there was conflicting testimony regarding the details of the accident, and in particular whether McNay had used her turn signal as prescribed by KRS[1] 189.380(1)(2). Expert medical witnesses, who testified for Hadley, raised questions regarding the extent of McNay's physical injuries. After hearing the evidence, the jury determined that Hadley was 60% at fault in causing the accident, and that McNay was 40% at fault. The jury awarded McNay only $37.00 in damages, which represented the cost of repair to the muffler on her vehicle. In the judgment entered on July 9, 1999, the trial court offset 40% of that amount due to the comparative negligence of McNay and entered a judgment for $22.20. On July 19, 1999, McNay filed her motion for a new trial[2] or judgment notwithstanding the verdict,[3] which was denied by the trial court on August 6, 1999. This appeal followed.

McNay claims the damages awarded by the jury were inadequate and that a new trial should have been granted. Specifically, she argues:

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[1]Kentucky Revised Statutes.

[2]Kentucky Rules of Civil Procedure (CR) 59.01.

[3]CR 59.05.

> The [j]ury's failure to award medical damages after finding [Hadley] 60% negligent was the result of passion and prejudice and/or disregard for the evidence of injury presented by [McNay] at trial. When, in a case such as this, the [j]ury allocates fault to the Defendant as it has done, the trial court has a duty to correct the failure to award proportionate damages.

This argument totally ignores the fact that there was conflicting medical evidence regarding whether McNay had sustained any physical injury as a result of the accident; and the obvious rule that such issues of fact must be left for the jury to decide.

In Gabbard v. Commonwealth,[4] the former Court of Appeals stated:

> Appellant makes the further contention that the verdict is not sustained by the evidence, and was the result of passion and prejudice. . . . Deciding whose testimony shall be accepted as true is the important function of the jury. There was substantial evidence both ways, and on two occasions juries have accepted the prosecutrix' story. With substantial evidence to support it, we cannot usurp the jury's function and reach a different conclusion on this question of fact.

Accordingly, if there was substantial evidence to support the jury's finding that McNay did not suffer a compensable physical injury as a result of the accident, then those findings will not be disturbed on appeal.

In his deposition, Dr. Phillip R. Aaron testified in part:

> Q. I'm looking at this X-Ray report and it says there is no evidence of

[4]314 Ky. 240, 234 S.W.2d 752, 753 (1950).

disherniation and I do not see a fracture or dislocation. [Dr. Jann Aaron][5] said, there is a slight reversal of the lordonic curve and this [is] consistent with muscle spasms.

. . . .

A. That's why as I told you it is a very significant finding what you just read me, sir. Very, very significant. I'm glad you read it to this jury because that is all they need to know, is that Dr. Jann Aaron, an imminent neuroradiologist, probably the best in the nation in Kentucky, probably one of the four of five in the nation, with her qualifications has said there is a significant finding. . . . It doesn't matter about some of these other experts.

Q. It doesn't matter what the MRI says? It doesn't matter what the X-Ray says?

A. No, because they were only describing herniation or disk disease and she doesn't have that. Dr. Jann Aaron showed that, too, but she has a muscle spasm in her neck and it is --

Q. She said it is a slight muscle spasm.

A. She said it is a muscle spasm.

Q. A muscle spasm in and of itself is not that significant, is it, doctor?

A. Sir, a muscle spasm that shows up on an MRI or on X-Ray is very significant. It has to be significant enough to change the whole curve of the spinal cord, the lordonic curve that you [mentioned earlier], it is very, very significant.

[5]Dr. Phillip Aaron and Dr. Jann Aaron are not related.

While the above testimony indicated that McNay may have indeed suffered an injury as a result of the accident, Dr. Paul K. Forberg, by deposition, testified as follows:

> Q. Doctor, in evaluating and forming your opinion, did you also view an X-Ray or the results of an X-Ray taken on 10/31/96, [the day after the accident]?
>
> A. Yes.
>
> Q. And did you review an MRI or MRI report of the cervical spine dated 2/20/97?
>
> A. Yes.
>
> Q. I'm going to hand both of those [results] to you.
>
> A. They were both, I believe, interpreted as normal by the radiologist.
>
> . . . .
>
> Q. Doctor, what were the results of the tests that you performed on Ms. McNay?
>
> A. Objectively, the examination was normal. She did complain of pain with motion of the cervical spine, but the examination fell within normal variation, objectively.
>
> . . . .
>
> Q. Doctor, is there anything that I have not gone over on which you would like to make comment?
>
> A. [ ] The diagnostic tests, except for some of the neurological or electrical tests, have all been normal. The clinical findings were normal. The degree of pain over two and a half years seems out of proportion to the physical findings, and I think basically that would be the major conclusions from my examination.

Dr. Forberg further testified that the abnormal neurological tests seemed "out of proportion" to what he would expect from this kind of injury absent any other physical findings, and that he did not think the pain McNay complained of was related to the accident. Finally, Dr. Phillip Aaron testified that an X-Ray taken the day after the accident was normal, an MRI taken approximately four months after the accident was normal, and a nerve conduction test taken almost one year after the accident was normal.

From the above, it is obvious that there was substantial evidence in support of the jury's decision not to award any damages for medical expenses which McNay claimed were related to her alleged physical injuries. Although there was testimony indicating a possible physical injury, there was also substantial testimony to the contrary. It was within the province of the jury to determine which testimony to believe. When there is substantial evidence to support the verdict, it must be affirmed.

McNay also claims the trial court erred in its instructions to the jury. She argues in part:

> Review of the trial video shows that in the reading of Instruction No. IV(E), the Court stated:
>
> > Not to turn her vehicle automobile from a direct course upon U.S. Highway 127 unless and until such movement could be made with reasonable safety, and if

> Plaintiff's[6] automobile was approaching near enough to be affected by such movement, not to turn to the right without first giving a signal. . . [emphasis added in original].
>
> . . . .
>
> The instruction given is a Plaintiff's instruction and is proper when the Plaintiff is the party in the rear and suing the turning party. As such, it is not relevant and was improper to this action where the Plaintiff was the driver of the car which was hit from the rear by the Defendant. This instruction would only have been appropriate had Jamie Hadley been the Plaintiff, which, of course, he was not.

McNay objected to this instruction at trial,[7] and argued that it had the effect of placing a greater duty on her as the plaintiff than on the defendant Hadley. In this appeal, she claims the mistake made by the trial judge in reading the jury instruction prejudiced the jury against her. We fail to see how this minor mistake, which was timely corrected, resulted in any harmful error.

In her final argument, McNay states, "[t]he jury's award of $37 damages illustrates confusion, and/or passion and prejudice by the jury." She also claims that, "[i]t is clear that the jury disregarded its own apportionment of fault in the

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[6]While the trial judge stated, "Plaintiff's automobile," the written jury instruction was corrected to properly read, "Defendant's automobile."

[7]Appellant stated in her brief that this alleged error was preserved for review, but failed to show this Court where it had been preserved with citations to the record. See Surber v. Wallace, Ky.App., 831 S.W.2d 918, 920 (1992).

allocation of damages, and Appellant is entitled to reversal." We do not believe this third argument adds anything to McNay's appeal that has not already been addressed in the first argument concerning the adequacy of damages.

For these reasons, the judgment of the Russell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Robert L. Bertram Jamestown, KY	Daniel G. Yeast Somerset,KY